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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2429-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IBN MUHAMMAD,

Defendant-Appellant.

Submitted February 27, 2017 — Decided March 9, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 08-
09-2743.

Joseph E. Krakora, Public Defender, attorney
for appellant (William Welaj, Designated
Counsel, on the brief).

Carolyn A. Murray, Acting Essex County
Prosecutor, attorney for respondent (Kayla E.
Rowe, Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Ibn Muhammad appeals from the December 10, 2015 Law Division order denying his petition for post-conviction relief (PCR). We reverse and remand for an evidentiary hearing.

We previously set forth the underlying facts in this matter in our opinion in defendant's direct appeal. State v. Muhammad, No. A-5475-10 (App. Div. June 28, 2013) (slip op. at 1-10), certif. denied, 218 N.J. 275 (2014). Therefore, we need only reference the essential background facts here.

Defendant was charged with a number of offenses arising out of three incidents occurring over a four-month span. Id. at 4-7. The State alleged that on September 6, 2007, defendant and two accomplices shot at another man, Jeffrey Christopher, who returned their fire. Id. at 4, 9. The State next asserted that on January 12, 2008, defendant and another accomplice shot Christopher to death in an empty parking lot. Id. at 4-5, 9. Thereafter, the State alleged that defendant and two accomplices attempted to tamper with a potential witness on February 4, 2008 by threatening her with a gun. Id. at 6-8. At trial, one witness identified defendant as being involved in the September 6, 2007 shooting; two witnesses identified defendant in the January 12, 2008 murder; and the witness who was threatened on February 4, 2008 confirmed the threat at trial. Id. at 6-10.

With reference to the matters defendant would later raise in his PCR petition, defendant's attorney did not file a motion to sever any of the charges at trial. Defendant did not testify or present any witnesses, and he also did not raise an alibi defense. With regard to defendant's decision not to testify, he stated under oath in response to the trial judge's questions that he had thoroughly discussed the matter with his attorney and had concluded that he did not wish to testify.

At the conclusion of the trial, the jury acquitted defendant of the charges arising from the September 6, 2007 incident, but convicted him of the remaining charges, including first-degree murder, second-degree witness tampering, and second-degree weapons offenses. Id. at 1. The trial judge sentenced defendant to life imprisonment with thirty years of parole ineligibility on the murder charge, a consecutive ten-year term on the witness tampering charge, and concurrent five- and ten-year terms on the weapons offenses. Ibid.

Among other arguments raised on his direct appeal from his conviction and sentence, defendant contended for the first time that the charges arising from the September 6, 2007 shooting should have been severed from the offenses involved in the victim's murder on January 12, 2008. Id. at 2-3. Defendant also asserted that his trial attorney was ineffective because he did not file a

severance motion. Ibid. Citing State v. Cofield, 127 N.J. 328, 338 (1992), we rejected defendant's argument, finding that "all of the factors militating against severance were established[,]" especially because the September 7, 2007 "incident was relevant to establish defendant's motive for the later shooting." Muhammad, supra, (slip op. at 14-15). We also stated that defendant could raise his ineffective assistance of counsel contention in a PCR petition. Id. at 15.

We affirmed defendant's conviction on direct appeal, but remanded the matter to the trial court to correct the judgment of conviction "to reflect that defendant was required to serve 63 years and nine months, without parole" under the No Early Release Act, N.J.S.A. 2C:43-7.2. Id. at 20-21. As noted above, the Supreme Court subsequently denied defendant's petition for certification. State v. Muhammad, 218 N.J. 275 (2014).

On August 20, 2014, defendant filed his PCR petition. He alleged that his trial attorney rendered ineffective assistance by not filing a severance motion. Defendant also argued that he wanted to testify at trial to tell the jury that he was not involved in any of the offenses and that Christopher was his friend. However, defendant asserted that his attorney did not advise him of the consequences of not testifying and coerced him to tell the judge he did not wish to do so. In defendant's initial

petition and his appointed PCR attorney's first supplemental brief, defendant did not argue that his trial attorney improperly failed to present an alibi defense.¹

Some months later, however, defendant's PCR attorney submitted another supplemental brief asserting on defendant's behalf that defendant advised his trial attorney that he had three witnesses who would testify that he was not involved in Christopher's murder. However, the trial attorney did not contact these witnesses or call them at trial.

The PCR attorney submitted copies of sworn statements by each of the witnesses. In one of the statements, the mother of defendant's child certified that on the morning of the murder, she and defendant "had a little argument" because he wanted to play basketball. She stated that defendant left the house at 9:15 a.m. "to play ball like he always does on Saturdays" and did not return until "about 5:20 p.m. or so."

The second purported alibi witness certified that he and defendant's brother picked up defendant around "10:00 a.m. or 10:30 a.m." and they "went to play ball at the YMCA." The three men played basketball until "about 3:30 p.m." and then "walked

¹ Defendant also included other contentions in his PCR petition, which the trial judge rejected. Because defendant does not raise these issues in the present appeal, we will not address them further in this opinion.

downtown and went clothes shopping." After "grabb[ing] something to eat[,]" the men dropped defendant "back off at his baby's mother's house approximately between 5:00 p.m. and 5:30 p.m." The third alibi witness, who was defendant's brother, also averred in his sworn statement that he was playing basketball with defendant at the time Christopher was shot.

The trial judge assigned to consider defendant's PCR petition did not conduct an evidentiary hearing. Following oral argument on December 10, 2015, the judge rendered an oral decision denying defendant's petition. The judge found that defendant raised the severance issue on direct appeal and the Appellate Division found that it was without merit. Thus, the judge concluded that had defendant's trial attorney made a severance motion, "it is not likely the motion would have been granted." Therefore, the judge determined that the trial attorney was not ineffective because he failed to file such a motion.

Even though the trial judge did not conduct a hearing, the judge next found that defendant's trial attorney's decision "not to call [defendant as a witness at trial] was simply a tactical strategy which did not prejudice [defendant] in any way." The judge noted that "[f]our witnesses identified . . . defendant as being involved in the shooting and being a violent individual in the community." Thus, the judge ruled that defendant had not

shown "specifically how his testimony would have changed the outcome of the case."

Finally, the trial judge rejected defendant's claim that his attorney was ineffective because he did not contact the three alibi witnesses or call them at trial. The judge found "it interesting that these witnesses would not have come up during the course of the trial or the subsequent years prior to this[.]" The judge stated:

So for these witnesses to suddenly appear . . . and to have a clear memory of eight years ago, I read through [the sworn statements] and it says . . . that one , they were playing basketball together. The other says, is his child's mother . . . who said [defendant] was at the house and when he left it . . . I don't see how suddenly, eight years later, someone has a clear memory of something when—and having not [previously] brought [it] forth[.]

This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR [PCR] WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR [PCR].

B. TRIAL COUNSEL DID NOT ADEQUATELY REPRESENT THE DEFENDANT ARISING OUT OF HIS FAILURE TO THOROUGHLY DISCUSS WITH HIS CLIENT ALL RELEVANT RAMIFICATIONS ASSOCIATED WITH THE DECISION WHETHER OR NOT TO TESTIFY, AS A RESULT OF WHICH THE DEFENDANT DID NOT TESTIFY IN HIS OWN DEFENSE.

C. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO EFFECTIVELY PURSUE AN ALIBI DEFENSE.

D. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO MOVE FOR A SEVERANCE OF COUNTS I THROUGH IV RELATING TO THE SEPTEMBER 6, 2007 SHOOTING FROM THE REMAINING COUNTS OF THE INDICTMENT.

POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR [PCR], IN PART, ON PROCEDURAL GROUNDS PURSUANT TO RULE 3:22-5.

When petitioning for PCR, the defendant must establish "by a preponderance of the credible evidence" that he or she is entitled to the requested relief. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). To establish a prima facie claim of ineffective assistance of counsel, the defendant is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 60-61 (1987).

The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing, and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999). However, an evidentiary hearing should be conducted where the defendant has established a prima facie showing in support of the requested relief. Preciose, supra, 129 N.J. at 462.

When determining whether to grant an evidentiary hearing, the trial judge must consider the facts in the light most favorable to the defendant. Id. at 462-63. "If there are disputed issues as to material facts regarding entitlement to post-conviction relief, a hearing should be conducted." State v. Russo, 333 N.J. Super. 119, 138 (App. Div. 2000). We review a trial judge's decision to grant or deny a defendant's request for a hearing under an abuse of discretion standard. Id. at 140.

We first address defendant's contention that his trial attorney was ineffective because he did not file a motion to sever the charges relating to the September 6, 2007 shooting from the charges relating to Christopher's murder on January 12, 2008. This argument lacks merit.

As we held in our opinion in defendant's direct appeal, the September 6, 2007 incident was relevant to establish defendant's

motive in the murder that followed on January 12, 2008. Muhammad, supra, (slip op. at 14-15). We explained:

The incidents were similar in kind, both involving a shooting, the latter one resulting in the victim's death. [One of the witnesses] was an eyewitness to the earlier incident and knew defendant from the area, and the probative value of establishing defendant's connection to the victim was not outweighed by undue prejudice to defendant in prosecuting the offenses together.

[Id. at 15.]

It is well established that "[i]t is not ineffective assistance of counsel for defense counsel not to file a meritless motion[.]" State v. O'Neal, 190 N.J. 601, 619 (2007). Because a severance motion would not have been successful, defendant's trial attorney was not ineffective because he failed to file one. Therefore, we affirm the trial judge's ruling on this point.

However, we disagree with the trial judge that an evidentiary hearing was not required to consider defendant's contentions concerning the alibi witnesses and his decision not to testify at trial. With regard to the alibi witnesses, defendant claimed he advised his trial attorney that he had an alibi and provided the names of the three witnesses. Defendant asserts that his attorney did not investigate the alibi claim or call the three witnesses at trial.

A defendant may show that he or she was prejudiced by his or her trial counsel's failure to investigate if the testimony that would have been offered by an alibi witness would "have given rise to reasonable doubt about defendant's guilt." State v. Pierre, 223 N.J. 560, 588 (2015). The testimony of an alibi witness does not have to be free of credibility issues; it must simply have the ability to bolster the defense or refute the State's position if believed by the jury. Id. at 586-88. If there is a reasonable probability that the testimony of a witness who was not presented at trial or properly investigated by counsel could alter the outcome of the trial, a court should find that "counsel's errors were sufficiently serious so as to undermine confidence that defendant's trial was fair, and that the jury properly convicted him." Id. at 588.

The testimony of an alibi witness, when supported by the witness's affidavit or certification, should not be dismissed as not credible without an evidentiary hearing. See State v. Jones, 219 N.J. 298, 314 (2014) ("Although the timing and motivation of [the alibi witness's] statement and her reasons for not voluntarily appearing to testify as apparently had been expected raise important questions, those questions cannot be assessed and resolved without determining credibility."); State v. Porter, 216 N.J. 343, 356 (2013) ("The court's findings regarding defendant's

and his girlfriend's credibility, based only on their affidavits, was an improper approach to deciding this PCR claim and effectively denied defendant an opportunity to establish ineffective assistance of trial counsel."). "Even a suspicious or questionable affidavit supporting a PCR petition 'must be tested for credibility and cannot be summarily rejected.'" Id. at 335 (quoting State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008)).

Here, the trial judge found that the alibi witnesses' claims that defendant was playing basketball at the time of Christopher's murder were not credible because defendant and the witnesses waited too long to come forward with this information. However, as the Supreme Court held in Porter, "[a]ssessment of credibility is the kind of determination 'best made through an evidentiary proceeding with all its explorative benefits, including the truth-revealing power which the opportunity to cross-examine bestows.'" Id. at 347 (quoting State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999)). Because the trial judge incorrectly made a credibility determination without first conducting an evidentiary hearing, we are constrained to reverse and remand for an evidentiary hearing on defendant's alibi claim.²

² We note that defendant's claim that he notified his trial attorney of the three alibi witnesses during the trial was set forth in the cover letter his PCR attorney sent to the trial court

We reach a similar conclusion with regard to defendant's assertion that the trial judge should have conducted an evidentiary hearing to consider his contention that his trial attorney did not properly advise him concerning his decision not to take the stand. The judge found that defendant's attorney's decision "not to call [defendant as a witness at trial] was simply a tactical strategy[.]" While this may be true, there is nothing in the record to support this finding. Defendant's attorney did not explain his strategy at trial and defendant claims that although he stated he did not wish to testify, he did so only because his attorney did not properly advise him of his options. Under these circumstances, we conclude that the trial judge also mistakenly denied defendant's request for an evidentiary hearing on this issue. Therefore, we reverse this portion of the judge's ruling.


In sum, we affirm the trial judge's finding that defendant's trial attorney was not ineffective because he failed to file a severance motion. However, we reverse the portion of the judge's decision that denied defendant's request for an evidentiary hearing on his alibi claim and his assertion that his trial

with the three sworn witness statements. As the Supreme Court observed in Jones, the better practice would have been for the PCR attorney to have prepared a supplemental certification from defendant setting forth this claim. Supra, 219 N.J. at 312. However, as in Jones, "we do not visit on defendant the failings of counsel in this instance[.]"

attorney did not properly advise him concerning his right to testify at trial. We remand for an evidentiary hearing on the merits of defendant's ineffective assistance of counsel claims on these two issues. In reversing and remanding this matter for a hearing, we express no view as to the merits of defendant's petition for PCR.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION